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# John C. Grimberg Co. v. United States: Has the Federal Circuit Eased the Restrictions of the Buy American Act

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## NOTES

### *John C. Grimberg Co. v. United States: Has the Federal Circuit Eased the Restrictions of the Buy American Act?*

#### I. Introduction

Traditionally, U.S. industry and its workers have felt threatened by foreign competition. Some protection from this threat exists in the form of the Buy American Act.<sup>1</sup> Although originally passed by Congress during the Great Depression,<sup>2</sup> the Act remains significant today. The Act provides that only articles, materials, and supplies produced or manufactured in the United States shall be acquired for public use inside the United States.<sup>3</sup> The same restrictions apply to contractors, subcontractors, and suppliers<sup>4</sup> of every public works construction contract funded by federal appropriations.<sup>5</sup>

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<sup>1</sup> 41 U.S.C.A. §§ 10a-d (West Supp. 1989).

<sup>2</sup> Buy American Act, ch. 212, tit. III, 47 Stat. 1489 (1933) (codified as amended at 41 U.S.C.A. §§ 10a-d (West Supp. 1989)).

<sup>3</sup> Section 2 of the Act provides in pertinent part:

Notwithstanding any other provision of law, and unless the head of the Federal agency concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, shall be acquired for public use.

41 U.S.C.A. § 10a (West Supp. 1989). The 1988 amendments substituted "Federal agency" for "department or independent establishment." Buy American Act of 1988, Pub. L. No. 100-418, tit. VII, § 7005(b), 102 Stat. 1553.

<sup>4</sup> 41 U.S.C.A. § 10b(a) (West Supp. 1989); *see infra* note 5. The standard Buy American Act clause states in part: "The Contractor agrees that only domestic construction material will be used by the Contractor, subcontractors, material men, and suppliers in the performance of this contract, except for foreign construction materials, if any, listed in this contract." 48 C.F.R. § 52.225-5 (1988).

<sup>5</sup> Section 3 of the Act provides in pertinent part:

(a) Every contract for the construction, alteration, or repair of any public building or public work in the United States growing out of an appropriation heretofore made or hereafter to be made shall contain a provision that in the performance of the work the contractor, subcontractors, material men, or suppliers, shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined,

While it may appear restrictive on its face, the Act provides flexibility for the procuring agency. It applies only to those items that are manufactured in the United States in sufficient and reasonably available quantities of satisfactory quality, and only to raw materials similarly available.<sup>6</sup> The head of the procuring agency may purchase foreign goods or goods made from raw materials originating abroad if the agency head determines that the acquisition of domestic goods would be inconsistent with the public interest, or finds the price of domestic goods to be unreasonable.<sup>7</sup> Likewise, the agency head may make exceptions for particular items in construction contracts.<sup>8</sup>

The Act itself sets no criteria for determining the reasonableness of prices of domestic products. Executive Order No. 10,582 implements the Act, and directs that a differential be added to the price of the foreign materials for comparison with prices of domestic materials.<sup>9</sup> Federal Acquisition Regulations direct application of a straightforward six percent differential, in specified cases.<sup>10</sup> For ex-

produced, or manufactured, as the case may be, in the United States except as provided in section 10a of this title . . . .

41 U.S.C.A. § 10b(a) (West Supp. 1989). Federal acquisition regulations require the insertion of a Buy American clause into solicitations and contracts for construction inside the United States. 48 C.F.R. § 25.205 (1988).

<sup>6</sup> Section 2 of the Act provides in pertinent part:

This section shall not apply with respect to articles, materials, or supplies for use outside the United States, or if articles, materials, or supplies of the class or kind to be used or the articles, materials, or supplies from which they are manufactured are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

41 U.S.C.A. § 10a (West Supp. 1989); *see also supra* note 3. Section 3 of the Act, relating to construction contracts, further provides:

[i]f the head of the federal agency making the contract shall find that in respect to some particular articles, materials, or supplies it is impracticable to make such requirement or that it would unreasonably increase the cost, an exception shall be noted in the specifications as to that particular article, material, or supply, and a public record made of the findings which justified the exception.

41 U.S.C.A. § 10b(a) (West Supp. 1989); *see also supra* note 5.

<sup>7</sup> 41 U.S.C.A. § 10a; *see supra* note 3.

<sup>8</sup> 41 U.S.C.A. § 10b(a); *see supra* note 6.

<sup>9</sup> The Order provides in pertinent part:

(b) For the purposes of the said act of March 3, 1933 . . . the bid or offered price of materials of domestic origin shall be deemed to be unreasonable, or the purchase of such materials shall be deemed to be inconsistent with the public interest, if the bid or offered price thereof exceeds the sum of the bid or offered price of like materials of foreign origin and a differential computed as provided in subsection (c) of this section.

[(c)](1) The sum determined by computing six per centum of the bid or offered price of materials of foreign origin [or]

(2) The sum determined by computing ten per centum of the bid or offered price of materials of foreign origin exclusive of applicable duty and all costs incurred after arrival in the United States . . . .

Exec. Order No. 10,582, § 2, 3 C.F.R. 230, 231 (1954-1958), *reprinted in* 41 U.S.C. § 10d app. at 1042 (1982).

<sup>10</sup> 48 C.F.R. § 25.105(a) (1988). This section only applies to supplies contracts. 48

ample, in a supply contract the price of a domestic product is unreasonable if it exceeds the lowest foreign price by more than six percent. The Executive Order and implementing regulations do not apply when the head of the procuring agency determines that a greater price differential is reasonable or "that the purchase of domestic materials is not inconsistent with the public interest."<sup>11</sup>

The Buy American Act and its implementing regulations do not address the question of what standards, if any, apply to requests for exceptions submitted after contracts are awarded. The United States Court of Appeals for the Federal Circuit recently addressed this question. The court held in *John C. Grimberg Co. v. United States*<sup>12</sup> that a contractor was entitled to an equitable adjustment of the contract price after the contract was performed because the Navy refused to grant a post-award exception to the requirements of the Buy American Act. This Note examines the reasoning behind that decision, its place in the development of public contract law, and its possible effects on federal procurement practices.

## II. Statement of the Case

In *Grimberg* the plaintiff contractor had been awarded a contract by the Navy for construction work at the Naval Center in Bethesda, Maryland.<sup>13</sup> Prior to bidding, it had managed to secure only one quotation from a domestic subcontractor for the fabrication and installation of precast concrete wall panels included in the contract.<sup>14</sup> After it received the award, Grimberg was unable to consummate the subcontract.<sup>15</sup> It resolicited bids from domestic subcontractors and received two higher quotations covering only fabrication.<sup>16</sup> Grimberg then subcontracted both the fabrication and installation to

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C.F.R. § 25.100 (1988). The section that applies to construction contracts appears to give the agency head discretion to determine that using a particular domestic product "would unreasonably increase the cost or would be impracticable." 48 C.F.R. § 25.203(a) (1988). The subpart regarding construction contracts, however, expressly incorporates Executive Order No. 10,582. See 48 C.F.R. § 25.200 (1988). Therefore, the agency head presumably would utilize either the six percent differential or the ten percent differential to determine whether the restrictions of the Act apply to construction contracts. See *supra* note 9.

<sup>11</sup> Exec. Order No. 10,582, § 5, 3 C.F.R. at 231, reprinted in 41 U.S.C. § 10d app. at 1042.

<sup>12</sup> 869 F.2d 1475 (Fed. Cir. 1989).

<sup>13</sup> *Id.* at 1476.

<sup>14</sup> *Id.* Arban & Carosi, a domestic supplier, quoted a total price of \$245,000—\$165,500 for fabrication and \$79,500 for erection, caulking, and cleaning. *Id.*

<sup>15</sup> *Id.* The majority simply stated that Grimberg unsuccessfully attempted to contact Arban & Carosi shortly after the award. The dissent pointed out that Grimberg never attempted to contact Arban & Carosi in writing. Judge Bennett thus maintained in dissent that Grimberg's own neglect in failing to firm up the contract led the company to seek a post-award exemption. *Id.* at 1480 (Bennett, J., dissenting).

<sup>16</sup> *Id.* at 1476. The quotations were for \$205,000 and \$200,918. Both covered only the fabrication of the precast panels. *Id.*

a Canadian firm.<sup>17</sup>

The Navy rejected the panel drawings Grimberg submitted because use of the Canadian fabricator violated the Buy American Act, and refused Grimberg's subsequent request for a waiver of the requirements of the Act.<sup>18</sup> Grimberg eventually obtained the panels from a domestic subcontractor at a higher price than that quoted by the Canadian firm.<sup>19</sup> Pursuant to the contract's disputes clause, Grimberg submitted a claim to the Navy for equitable adjustment.<sup>20</sup> The Navy denied the claim, and Grimberg appealed to the Armed Services Board of Contract Appeals,<sup>21</sup> contending that the Navy was obligated to grant an exception either because of unavailability or unreasonable cost of domestic panels.<sup>22</sup>

The Armed Services Board held against Grimberg, finding the case to fall within the general rule that availability of materials is a business risk assumed by the contractor.<sup>23</sup> The Board found as a matter of fact that the panels were available, but at a higher price.<sup>24</sup> It rejected Grimberg's unreasonable cost argument based on its reading of Executive Order No. 10,582 and the Federal Circuit's opinion in *John T. Brady & Co. v. United States*,<sup>25</sup> which allowed a post-award waiver of the Act.<sup>26</sup> The Board found that section 5 of the Order gives agencies the flexibility to utilize higher price differentials than those prescribed even in the absence of regulations specifically establishing greater differentials for construction contracts.<sup>27</sup> The Board looked to *Brady* for guidance as to what circumstances would warrant a post-award exception for unreasonable cost,<sup>28</sup> and found

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<sup>17</sup> *Id.* The subcontract carried a price of \$120,000 for fabrication and \$117,000 for erection and miscellaneous work, for a total price of \$237,000. *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* Grimberg's actual costs amounted to \$282,000, including \$200,000 for fabrication, \$59,000 for erection, and approximately \$23,000 for miscellaneous work. *Id.*

<sup>20</sup> Grimberg submitted an equitable adjustment claim for \$53,847. *Id.* Government contracts generally contain a changes clause that permits the contracting officer to make unilateral changes, in designated areas, within the scope of the contract. 48 C.F.R. § 43.201 (1988); Checchi, *Federal Procurement and Commercial Procurement Under the U.C.C. — A Comparison*, 11 PUB. CONT. L.J. 358, 363-64 (1980). The disputes clause provides that the contracting officer shall make an equitable adjustment in the price or schedule if the change results in an increase or decrease in the cost or time of performance, whether or not directly changed by the order. See, e.g., 48 C.F.R. § 52.243-4(d) (1988) (for construction contracts). Many changes clauses expressly give the contractor a right to present a claim under the disputes clause when there is a failure to agree on the amount of the adjustment. Checchi, *supra*, at 364; see, e.g., 48 C.F.R. § 52.243-1(e).

<sup>21</sup> *John C. Grimberg, Co.*, ASBCA No. 32288, 88-1 B.C.A. (CCH) ¶ 20,346, at 102,888 (1987), *reconsideration denied*, 88-2 B.C.A. (CCH) ¶ 20,713 (1988), *rev'd sub nom.* *John C. Grimberg, Co. v. United States*, 869 F.2d 1475 (Fed. Cir. 1989).

<sup>22</sup> *John C. Grimberg*, 88-1 B.C.A. (CCH) at 102,894.

<sup>23</sup> *Id.* at 102,895.

<sup>24</sup> *Id.* at 102,890 (finding no. 6), 102,894.

<sup>25</sup> 693 F.2d 1380 (Fed. Cir. 1982).

<sup>26</sup> *John C. Grimberg*, 88-1 B.C.A. (CCH) at 102,894 (citing *Brady*, 693 F.2d at 1387).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* "[I]t may be impossible for the contractor in some instances to make a pre-

such circumstances lacking in Grimberg's case.<sup>29</sup>

The Federal Circuit reversed, concluding that the Board erred as a matter of law in interpreting both the Buy American Act and *Brady*.<sup>30</sup> According to the court, the Executive Order presents the head of the procuring agency with the option to make a determination as to the appropriate price differential. When the head of the agency chooses not to exercise his option, the prescribed six percent differentials become mandatory.<sup>31</sup>

More significantly, the court gave a broad construction to *Brady*. While the Armed Services Board read *Brady* as recognizing post-award exceptions only under a narrow range of circumstances,<sup>32</sup> the Federal Circuit found that *Brady* simply allowed additional factors to be considered in reviewing denial of post-award waivers.<sup>33</sup> This means that the granting of a post-award waiver or adjustment is discretionary.<sup>34</sup> In Grimberg's case, the court held that the denial of a post-award waiver was an abuse of discretion by the Navy, constituting a constructive change and entitling Grimberg to an equitable adjustment under the contract's changes clause.<sup>35</sup> However, the court did not identify those additional factors that may be considered in the post-award decision, nor did it offer any guidance as to how to assess those factors.

In a dissenting opinion, Judge Bennett called for a much narrower reading of *Brady*, one in accord with established contract law.<sup>36</sup> He agreed with the Armed Services Board that *Brady* allows post-award exceptions or equitable adjustment only under extraordi-

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award request for exemption. . . . There will be other instances where domestic material is unavailable or where its price escalates dramatically after the contract has been awarded." *Id.* (quoting *Brady*, 693 F.2d at 1386). As an example of such a dramatic price escalation, the Board referred to the *Brady* court's citation of a case in which the price increased from \$2.14 to \$12.14 after the award. *Id.* at 102,894-95 (citing *Brady*, 693 F.2d at 1386 n.3).

<sup>29</sup> *Id.* at 102,894.

<sup>30</sup> *Grimberg*, 869 F.2d at 1477.

<sup>31</sup> *Id.*

<sup>32</sup> *John C. Grimberg, Co.*, ASBCA No. 32288, 88-2 B.C.A. (CCH) ¶ 20,713, at 104,664 (1988), denying reconsideration to 88-1 B.C.A. (CCH) ¶ 20,346 (1987).

<sup>33</sup> *Grimberg*, 869 F.2d at 1478.

<sup>34</sup> *Id.* at 1478 n.2.

<sup>35</sup> *Id.* at 1478. The Board of Contract Appeals developed the doctrine of constructive change in order to resolve controversies arising from the performance of additional work because of some informal government action or inaction. D. ARNAVAS & W. RUBERRY, GOVERNMENT CONTRACT GUIDEBOOK 10-14 (1986). The effect of a constructive change is the same as the effect of a formal change order, *id.*, and, just as with a change order, the adjustment may be upward or downward. One major category of constructive changes involves defective specifications, where a contractor may be entitled to relief after the Government has failed to issue a proper change order. *Id.* at 7-17. In Grimberg's situation, it may be said that the specification of domestic materials was itself defective because of Grimberg's right to use foreign materials meeting the test of Executive Order No. 10,582. Once put on notice, the contracting officer had the duty to issue a change order allowing that use. His inaction constituted a constructive change.

<sup>36</sup> See *Grimberg*, 869 F.2d at 1479-80 (Bennett, J., dissenting) (harmonizing *Brady* with the rules that the contractor bears the risk of acquiring the materials necessary to complete

nary circumstances.<sup>37</sup> He saw the *Brady* exceptions as arising either from post-award unavailability of domestic materials or from action on the part of the contracting agency causing the failure to seek the exception before the award.<sup>38</sup> In *Brady*, and the cases approved therein, the contractors had no opportunity or reason to seek their exceptions before the award. Post-award exceptions in those circumstances pose no conflict with the rule that a contractor bears the risk of obtaining the materials necessary to his performance.<sup>39</sup> *Brady* is also in accord with the rule that the Government is responsible for the additional cost caused by its own delay.<sup>40</sup> In Judge Bennett's view, there was no inherent unfairness in Grimberg's situation that called for an equitable remedy, because Grimberg lost the proposed domestic supplier by its own neglect.<sup>41</sup>

Judge Bennett took issue with the majority on two further points. Either point would have changed the outcome of the decision. First, he argued that a proper application of the price differential would have shown that there was no actual harshness in requiring Grimberg to bear the additional costs of performing in compliance with the Buy American Act.<sup>42</sup> He argued that the price of foreign goods should have been compared to the quotation upon which Grimberg based its bid, not to the quotations it solicited after the award.<sup>43</sup>

Second, he disagreed with the majority's finding that the prescribed differential becomes mandatory in the absence of action by the agency head. Judge Bennett contended that the contracting officer validly exercised the power delegated to him when he denied Grimberg's claim for extra costs.<sup>44</sup> In Judge Bennett's eyes, the majority implicitly relied on the rule that discretionary authority conferred by statute cannot be delegated absent express statutory

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the contract, and that the Government is liable for any additional cost caused by its own delay).

<sup>37</sup> *Id.* at 1479 (Bennett, J., dissenting).

<sup>38</sup> *Id.* (Bennett, J., dissenting). The dissent compared *Grimberg* with the following: *John T. Brady & Co. v. United States*, 693 F.2d 1380 (Fed. Cir. 1982) (contracting agency's delay in providing specifications prevented pre-award request); *M.S.I. Corp.*, VACAB No. 503, 65-2 B.C.A. (CCH) ¶ 5,203 (1965) (post-award unavailability of specified material), and 40 Comp. Gen. 644 (1961) (contracting agency's placement of material on exempt list prevented pre-award request).

<sup>39</sup> 869 F.2d at 1479-80 (Bennett, J., dissenting).

<sup>40</sup> *Id.* at 1480 (Bennett, J., dissenting).

<sup>41</sup> *Id.* (Bennett, J., dissenting).

<sup>42</sup> *Id.* (Bennett, J., dissenting).

<sup>43</sup> *Id.* (Bennett, J., dissenting). For purposes of comparison, Judge Bennett added the six percent differential to the foreign materials portion of the bid from Grimberg's proposed Canadian subcontractor. *Id.* at 1480 n.2. The result was a total bid of \$244,200. *Id.* Grimberg had based its own bid on an expected domestic price of \$245,000, only 0.33% higher than the foreign bid. *Id.* at 1480; *see infra* notes 133-34 and accompanying text for a comparison with the majority's approach.

<sup>44</sup> 869 F.2d at 1483 (Bennett, J., dissenting).

provision.<sup>45</sup> He maintained that the authority to change the differential comes not from the Buy American Act, but from the implementing Executive Order.<sup>46</sup> Thus, the rule that power authorized by regulation may be delegated vests the contracting officer with the discretion to apply a greater differential.<sup>47</sup> The Act itself forbids use of any foreign product absent action by the agency head,<sup>48</sup> but the discretion to take that action was not in issue.<sup>49</sup> The discretion in issue was that afforded by the Executive Order to determine whether domestic goods are unreasonably priced, not unlike other powers of the agency heads that have been held delegable to the contracting officer.<sup>50</sup>

### III. Previous Cases on Post-Award Exemptions

Although the Buy American Act has played a part in much litigation, there is little precedent in the courts regarding post-award waivers. *Brady*, decided in 1982, was a case of first impression because all previous rulings had been administrative decisions.<sup>51</sup> As the court in *Brady* noted, those administrative boards' conclusions of law have no finality in the eyes of the courts.<sup>52</sup> The Comptroller General, however, has developed much expertise regarding the interpretation and application of the Buy American Act.<sup>53</sup> His opinions have been accorded substantial weight by the courts in many cases involving government procurements.<sup>54</sup>

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<sup>45</sup> *Id.* at 1482 (Bennett, J., dissenting). The majority rejected the dissent's delegation argument on the grounds that the contract itself explicitly prohibited delegation to the contracting officer by its definition of "agency head." *Id.* at 1478 n.1. The dissent read that definition as restricting only the meaning of "duly authorized representative" within the contract provisions. Judge Bennett dismissed the former language as mere boilerplate, ineffective against a rule of law permitting delegation. *Id.* at 1482 n.5 (Bennett, J., dissenting).

<sup>46</sup> *Id.* at 1482-83 (Bennett, J., dissenting).

<sup>47</sup> *Id.* at 1483 (Bennett, J., dissenting).

<sup>48</sup> See 41 U.S.C.A. § 10a (West Supp. 1989) "[U]nless the head of the Federal agency concerned shall determine . . . the cost to be unreasonable" materials of domestic origin shall be acquired for public use. *Id.*

<sup>49</sup> 869 F.2d at 1482 (Bennett, J., dissenting).

<sup>50</sup> *Id.* (Bennett, J., dissenting). Judge Bennett cited one example, an agency head's power to cancel bid invitations after the opening of bids, 48 C.F.R. § 14.404-1(c), one of the grounds for which is that all bids are unreasonably priced. 48 C.F.R. § 14.404-1(c)(6) (1988). Although the regulation requires the agency head to make the determination in writing, it has been held the contracting officer may do so. 869 F.2d at 1483 (Bennett, J., dissenting).

<sup>51</sup> *John T. Brady & Co. v. United States*, 693 F.2d 1380, 1384-85 (Fed. Cir. 1982).

<sup>52</sup> *Id.* at 1385. The standard of review is set by statute. On appeal from a decision of an agency board of contract appeals, "notwithstanding any contract provision, regulation, or rules of law to the contrary, the decision of the agency board on any question of law shall not be final or conclusive." Contract Disputes Act § 10, 41 U.S.C. § 609 (1982).

<sup>53</sup> 693 F.2d at 1385.

<sup>54</sup> See, e.g., *id.* (noting expertise of Comptroller General regarding Buy American Act); *Allis-Chalmers Corp. v. Friedkin*, 481 F. Supp. 1256, 1268 (M.D. Pa.), *aff'd*, 635 F.2d 248 (3d Cir. 1980) (great weight entitled to interpretations of Buy American Act regulations by agency charged with administering them); *Wheelabrator Corp. v. Chafee*, 455 F.2d 1306,



The Comptroller General has held consistently that the winning bidder assumes the legal obligation to provide domestic products if the bidder fails to declare otherwise in a Buy American Certificate included with the bid.<sup>55</sup> On the other hand, he also has held that changes to the contract's list of exempt items may be made at any time,<sup>56</sup> including during performance of the contract.<sup>57</sup> To do this, a change order should be issued and accompanied by an equitable adjustment in price if appropriate.<sup>58</sup>

As to the mandatory nature of the six percent differential, the Comptroller General has held on two occasions that it applies in the absence of a contrary determination by the head of the procuring agency.<sup>59</sup> The Executive Order vests "discretionary authority in the agency head" to make such determinations.<sup>60</sup> Despite never addressing the question whether the contracting officer could exercise such discretion, the opinions do not seem to contemplate such a possibility.<sup>61</sup>

Prior to *Brady*, the administrative boards of contract appeals denied relief to contractors who unsuccessfully sought post-award exceptions to the Buy American Act based on price. The Veterans Administration Contracts Appeals Board addressed the question of

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1314-16 (D.C. Cir. 1971) (reviewed role of General Accounting Office in bid protest actions; court may issue preliminary injunction pending determination by that agency). For a discussion of the Comptroller General's authority and role, see Tieder & Tracy, *Forums and Remedies for Disappointed Bidders on Federal Government Contracts*, 10 PUB. CONT. L.J. 92, 95-106 (1978).

<sup>55</sup> 47 Comp. Gen. 624, 626 (1968) (no material difference between bidder's failure to execute the certificate and agency's failure to include certificate in bid invitation) (citing Comp. Gen. Dec. B-157815 (Jan. 21, 1966) (failure to execute certificate binds contractor)). Accord 50 Comp. Gen. 697, 702 (1971) (citing Comp. Gen. Dec. B-150652 (July 19, 1963) and Comp. Gen. Dec. B-153899 (Sept. 24, 1964)). The published decisions dealt with protests by losing bidders, challenging the validity of the awards actually made. The later decision distinguished award validity from contract administration governing the contractor's compliance. *Id.* at 702.

<sup>56</sup> 42 Comp. Gen. 467, 475 (1963); 40 Comp. Gen. 644, 649 (1961) (copper did not appear on exempt list in bid invitation, but was inadvertently added in formal contract signed by parties; contractor entitled to assume that addition was deliberate and, entitling him to equitable adjustment when required to use domestic copper by officer's later change order).

<sup>57</sup> 42 Comp. Gen. at 475.

<sup>58</sup> 40 Comp. Gen. at 649.

<sup>59</sup> 48 Comp. Gen. 403, 405-06 (1968); 42 Comp. Gen. 608, 612 (1963).

<sup>60</sup> 42 Comp. Gen. at 612 (inconsistent exercise of discretionary authority by different agency heads no basis to disturb award).

<sup>61</sup> 48 Comp. Gen. at 406 ("[N]o determination . . . has been made by the Administrator of [the General Services Administration] either generally or in connection with the subject procurement. Accordingly, under the criteria established by Executive Order No. 10582 and FPR 1-6.104-4 . . . the price bid for your wrenches . . . must be regarded as unreasonable."); 42 Comp. Gen. at 612 ("No such determination was in fact made by the Administrator of the General Services Administration, and the provisions of the Executive Order therefore precluded acceptance of your bid because of unreasonable price.").

post-award exceptions in 1966, in *Klefstad Engineering Co.*<sup>62</sup> In upholding the denial of a post-award request, the Board indicated that all arguments for latitude must be made at the time of bid or not at all.<sup>63</sup>

In *M.S.I. Corp.*,<sup>64</sup> decided the previous year, the same Board had allowed a contractor's claim for equitable adjustment based on the government agency's delay in granting an exemption.<sup>65</sup> The reason for granting an exception in that case was the post-award unavailability of specified roofing materials, not the price of such materials.<sup>66</sup> The Board held that the contractor's obligation to locate a domestic source did not require him to provide an acceptable domestic substitute at his own expense when the specified materials were apparently only available abroad.<sup>67</sup> The contract provided that non-domestic materials would be accepted under the standards of the Buy American Act.<sup>68</sup> Therefore, once aware of the unavailability, the agency had a duty to elect within a reasonable time to order a change of materials or to grant an exemption.<sup>69</sup>

In 1976, in *Wright & Morrissey, Inc.*,<sup>70</sup> the Board refused to impose any post-award duty to consider exceptions in a case where availability was not an issue. The contractor made no mention in his bid of any intention to use foreign materials on the project, but he later submitted plans utilizing foreign goods along with a request for a waiver.<sup>71</sup> Relying on *Klefstad*, the Board held that the failure to seek a waiver when bidding made the contractual commitment to provide domestic materials binding.<sup>72</sup> The Board explicitly rejected the notion that the contracting officer's refusal to consider foreign

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<sup>62</sup> VACAB No. 551, 66-2 B.C.A. (CCH) ¶ 5987, at 27,672 (1966), *rev'd on other grounds on reconsideration*, 67-1 B.C.A. (CCH) ¶ 6393 (1967).

<sup>63</sup> *Id.* at 27,677 (argument that cost of foreign-made motors represented less than 50% of total unit cost should have been raised at time of bid).

<sup>64</sup> VACAB No. 503, 65-2 B.C.A. (CCH) ¶ 5,203, at 24,447 (1965).

<sup>65</sup> *Id.* at 24,459.

<sup>66</sup> *Id.* at 24,449-51.

<sup>67</sup> *Id.* at 24,451.

<sup>68</sup> *Id.* at 24,450.

<sup>69</sup> *Id.* at 24,451. The damage caused by the agency's delay was held recoverable under the contract's suspension of work clause. *Id.* at 24,459. The contractor, however, was allowed to recover under the suspension of work clause only those increased costs directly and "necessarily caused" by the unreasonable period of delay. *Id.* at 24,457. Note that the equitable adjustment was not made under the changes clause, nor was the Government held to have made a constructive change by failing to grant an exemption. Rather, the Government made the change, but was dilatory.

<sup>70</sup> VACAB No. 1147, 76-2 B.C.A. (CCH) ¶ 11,955, at 57,319 (1976).

<sup>71</sup> *Id.* at 57,320. The subcontractor who was to supply the intercom system had made his bid to the contractor without mentioning foreign equipment, but later decided to use a foreign made system. *Id.* at 57,320-21. The contractor later submitted plans for an intercom system along with a request for a waiver of the contract's Buy American Act provisions. *Id.* at 57,320. After that and a later proposal and request were rejected, the contractor installed domestic equipment and made a claim for equitable adjustment. *Id.*

<sup>72</sup> *Id.* at 57,321.

goods constituted a constructive change in the contract.<sup>73</sup>

In 1977, in *Edwin Moss & Son, Inc.*,<sup>74</sup> the General Services Administration Board of Contract Appeals denied an appeal by a contractor who asserted both unavailability and unreasonable cost.<sup>75</sup> The Board denied the appeal without reaching the question of whether the exception would have been justified had the request been timely.<sup>76</sup> It based its ruling on Executive Order 10,582, which was referenced in the contract.<sup>77</sup> The Board noted that the preamble to the Order predicates its procedures on the requirement that agency heads determine "as a condition precedent to the purchase" that domestic price is unreasonable or that purchase is in the public interest, and it also noted the repeated references in the body of the Order to "the bid or offered price."<sup>78</sup> The Board found that agency determinations clearly must precede contract awards; otherwise the contractor's obligation is binding.<sup>79</sup>

In 1979, in *John T. Brady & Co.*,<sup>80</sup> the Veteran's Administration Board once again denied an equitable adjustment for failure to request an exception at the time of the bid in accordance with the bidding directions.<sup>81</sup> In this instance, the contractor based its bid on a quote from a domestic aluminum supplier, but by the time the con-

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<sup>73</sup> *Id.* The Board noted that to find a constructive change would require a finding that the officer had a duty to consider a deviation, and that in the exercise of such a duty he would have been compelled to allow the deviation. *Id.*

<sup>74</sup> GSBCA No. 4521, 77-1 B.C.A. (CCH) ¶ 12,517, at 60,696 (1977).

<sup>75</sup> Prior to submitting its bid, Moss obtained a price quotation from one of the two domestic sources of the required sheet steel. Because the Government requested extensions, it did not award Moss the contract until one month had passed beyond the original deadline. *Id.* at 60,697. At this later date, Moss could not obtain steel from either of the two domestic sources in time to meet the contract deadline for the driving of sheet piling, one of the initial contract activities. *Id.* at 60,697-98. Moss submitted drawings using readily obtainable foreign steel and requested an exception from the GSA on the grounds of a price difference in excess of six percent. The contracting officer refused, saying that such data could not be considered subsequent to the award. *Id.* at 60,698.

<sup>76</sup> *Id.* The Board assumed for the sake of argument that the exception requirements would have been satisfied. *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* (citing Exec. Order No. 10,582, 3 C.F.R. 230 (1954-1958), reprinted in 41 U.S.C. § 10d app. at 1042 (1982)). The preamble to the Order states: "Whereas in the administration of the act of March 3, 1933 . . . the heads of executive agencies are required to determine, as a condition precedent to the purchase by their agencies of materials of foreign origin . . . (a) that the price of like materials of domestic origin is unreasonable . . ." Exec. Order No. 10,582, preamble, 3 C.F.R. at 230. For text of the order referring only to unreasonableness of the "bid or offered price," see *supra* note 9.

<sup>79</sup> *Moss*, 77-1 B.C.A. (CCH) at 60,698 (citing *Wright & Morrissey, Inc.*, VACAB No. 1147, 76-2 B.C.A. (CCH) ¶ 11,955 (1976); see also 50 Comp. Gen. 697 (1971)).

<sup>80</sup> VACAB No. 1300, 79-1 B.C.A. (CCH) ¶ 13,727, at 67,300 (1979), remanded *sub nom.* *John T. Brady & Co. v. United States*, 227 Ct. Cl. 513, 535 (1981) (per curiam order), *aff'd*, 693 F.2d 1380 (Fed. Cir. 1982).

<sup>81</sup> *Id.* at 67,302. Both the Veterans Administration Board and General Services Board considered the fact that the invitation for bids informed the bidder of the necessity to seek exceptions when bidding. See *id.*; *Wright & Morrissey*, 76-2 B.C.A. (CCH) at 57,320; *Edwin Moss & Son*, 77-1 B.C.A. (CCH) at 60,698 n.1.

tract had been awarded and the material ordered, the price of domestic aluminum had risen substantially.<sup>82</sup> The Board held the contracting officer to be without authority to grant post-award waivers, there being no provision for such in the Act or in the implementing regulations.<sup>83</sup> It also adopted the reasoning in *Edwin Moss & Son*, that the Executive Order requires exceptions to be determined as conditions precedent to the contract.<sup>84</sup>

Brady appealed to the United States Court of Claims.<sup>85</sup> Because Brady challenged findings of fact by the Board, and because the conclusions of law were issues of first impression for the court, the court referred cross-motions for summary judgment to the trial division for a recommendation.<sup>86</sup> The trial judge concluded that an exception to the Buy American Act could have been granted by means of a change order and remanded the case to the board for a determination of whether the exception was warranted.<sup>87</sup> The Government appealed that order.<sup>88</sup>

In 1982, the United States Court of Appeals for the Federal Circuit<sup>89</sup> rejected the decisions of the contract appeals boards and held that post-award exceptions to the Buy American Act are permissible. The court in *John T. Brady & Co. v. United States*<sup>90</sup> found nothing in the Buy American Act or in the implementing executive order requiring that exceptions be granted before the award, and nothing prohibiting changes in the contract after it is executed.<sup>91</sup> The court found those decisions of the Comptroller General approving post-award exceptions to present the correct interpretation of the Act.<sup>92</sup>

The *Brady* court's rationale was that adherence to the rigid rule followed by the Veteran's Administration Board would impose unfair burdens on contractors without furthering the objectives of the

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<sup>82</sup> 79-1 B.C.A. (CCH) at 67,301.

<sup>83</sup> *Id.* at 67,303.

<sup>84</sup> *Id.* (quoting *Edwin Moss & Son, Inc.*, GSBGA No. 4521, 77-1 B.C.A. (CCH) ¶ 12,517, at 60,698 (1977)).

<sup>85</sup> *John T. Brady & Co. v. United States*, 227 Ct. Cl. 513, 535 (1981) (per curiam order), *aff'd*, 693 F.2d 1380 (Fed. Cir. 1982).

<sup>86</sup> *Id.* at 536.

<sup>87</sup> *John T. Brady & Co. v. United States*, 693 F.2d at 1383.

<sup>88</sup> *Id.*

<sup>89</sup> The Court of Appeals for the Federal Circuit was created in 1982 and was given appellate jurisdiction over the decisions of the boards of contract appeals in cases arising under the Contract Disputes Act. Federal Courts Improvement Act of 1982, ch. 164, § 127, 96 Stat. 37 (1982) (codified at 28 U.S.C. § 1295 (1982)).

<sup>90</sup> 693 F.2d 1380 (Fed. Cir. 1982).

<sup>91</sup> *Id.* at 1385. The court noted that the preamble to the Executive Order states that such determinations are to be made as a condition precedent to *purchase* of materials, not as a condition precedent to the award. *Id.* Note that whereas the Veteran's Administration Board looked for provisions allowing post-award exceptions, the court looked for provisions prohibiting the same.

<sup>92</sup> The court quoted 40 Comp. Gen. 644, 649 (1961) and 42 Comp. Gen. 468, 474-75 (1963). 693 F.2d at 1385-86. See *supra* notes 56-58 for a discussion of these opinions.

Act.<sup>93</sup> The court noted three situations in which unfairness would result: (1) when it is impossible for the contractor to make the request before the award; (2) when domestic material becomes unavailable after the award; and (3) when the domestic price escalates dramatically after the award.<sup>94</sup> Brady's situation was one of pre-award impossibility, because the price rise occurred while the contracting agency delayed in providing the specifications Brady needed to make its order.<sup>95</sup>

On remand, the Board found the escalation in price was sufficiently severe to justify granting an exception.<sup>96</sup> The Board calculated the cost increase to the contractor, and the equitable adjustment due him, as the difference between what he actually paid for the domestic aluminum and what it would have cost had the exception been granted.<sup>97</sup> The Board added that it is "certainly in the public interest to grant legally permissible exceptions where there is no resulting expense to the Government, and where to grant such an exception serves to increase the public's perception of its Government as one which deals fairly with its contractors."<sup>98</sup>

Two years after *Brady*, in *L.G. Lefler, Inc. v. United States*,<sup>99</sup> the United States Claims Court read the relevant procurement regulations as effectively mandating a waiver of the Buy American Act in certain situations.<sup>100</sup> Existing Federal Procurement Regulations directed that domestic prices be deemed unreasonable if the lowest bid contained nondomestic materials, and the price of those materials was more than six percent less than that of domestic materials.<sup>101</sup> Those regulations provided that an agency head could authorize deviation from this requirement in accordance with the Act and Ex-

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<sup>93</sup> 693 F.2d at 1386.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> John T. Brady & Co., VACAB No. 1300, 84-1 B.C.A. (CCH) ¶ 16,925, at 84,197 (1983).

<sup>97</sup> *Id.* If the exception had been granted, the cost to Brady would have been \$162,047; actual costs were \$222,691, for a difference of \$60,644. *Id.* The Board added overhead and profit and awarded Brady \$75,720. *Id.* Interestingly, the Board pointed out that had the exception been granted, Brady may have owed the Government a credit, because the foreign price was \$22,898 less than the original domestic quote upon which Brady based its bid. *Id.* at 84,196-97. Unfortunately, the Board did not go on to explain why it did not consider Brady's additional costs to be the difference between its bid and its actual cost. See *infra* notes 133-34 for a discussion of award computations in *Grimberg*.

<sup>98</sup> 84-1 B.C.A. (CCH) at 84,197.

<sup>99</sup> 6 Cl. Ct. 514 (1984).

<sup>100</sup> *Id.* at 518.

<sup>101</sup> *Id.* (citing 41 C.F.R. § 18.603-1 (1982)). The Federal Procurement Regulations (FPR), 41 C.F.R. ch.1, and the Defense Acquisition Regulations (DAR), 32 C.F.R. ch. 1, were replaced effective April 1, 1984, by the Federal Acquisition Regulation (FAR), 48 C.F.R. ch.1 (1988), and various individual agency regulations. See 48 C.F.R. chs. 2-49 (1988). The FPR and the DAR continue to apply to contracts entered into before the effective date of the FAR.

Executive Order 10,582.<sup>102</sup> Veterans Administration regulations stated that the contracting officer must request authority to consummate the contract when he believes that the requirement is impractical or that deviation would be advantageous to the Government.<sup>103</sup> The court ruled that these regulations require a finding by the Government that the particular facts of a case warrant deviation before it can deny a waiver.<sup>104</sup> Additionally, the court found that language governing pre-award waivers should also apply to post-award waivers.<sup>105</sup>

#### IV. Significance of the *Grimberg* Decision

In *Grimberg*, the Federal Circuit gave a broad interpretation to the *Brady* and *Lefler* rulings and expanded the range of circumstances in which contractors may be entitled to equitable adjustment of the contract price. The decision had two components. First, the court ruled that under Executive Order No. 10,582, in evaluating the reasonableness of the price of domestic goods for the purposes of the Buy American Act, the head of the procuring agency has the option of establishing higher differentials.<sup>106</sup> If the agency head chooses not to exercise that option, the price differentials of section 2 of the Order become mandatory.<sup>107</sup> The court relied on the plain language of the Order,<sup>108</sup> the decisions of the Comptroller General,<sup>109</sup> and the finding of the Claims Court in *Lefler* that the same standards are applied post-award as pre-award.<sup>110</sup>

The *Grimberg* court, however, went one step beyond *Lefler*. As the dissent in *Grimberg* points out, the holding in *Lefler* was concerned with the equities of a fact situation once a post-award waiver had been granted, not with whether a waiver should be granted.<sup>111</sup> *Lefler* involved a winning bid based on the use of foreign materials.<sup>112</sup> The

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<sup>102</sup> 41 C.F.R. § 1-18.603-3 (1982).

<sup>103</sup> *Lefler*, 6 Cl. Ct. at 519 (citing 41 C.F.R. § 8-18.603-3 (1982)).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 519 n.5.

<sup>106</sup> *John C. Grimberg, Co. v. United States*, 869 F.2d 1475, 1477 (Fed. Cir. 1989). See *supra* note 31 and accompanying text.

<sup>107</sup> 869 F.2d at 1477.

<sup>108</sup> *Id.* "Section 2(b) provides that the price of domestic materials 'shall be deemed to be unreasonable' if it exceeds the price of like foreign materials plus a section 2(c) differential." *Id.* (quoting Exec. Order No. 10,582, 3 C.F.R. 230 (1954-1958), reprinted in 41 U.S.C. § 10d app. at 1042 (1982)).

<sup>109</sup> *Id.* (citing 42 Comp. Gen. at 612).

<sup>110</sup> *Id.* (citing *Lefler*, 6 Cl. Ct. at 519).

<sup>111</sup> See *id.* at 1481 (Bennett, J., dissenting). However, Judge Bennett further stated that any discussion in *Lefler* as to when such exemptions should be granted is pure dictum. *Id.* (Bennett, J., dissenting). The *Lefler* court believed it was answering the Government's contention that it had been coerced into granting the waiver in order to secure timely completion of a badly needed veteran's hospital. *Lefler*, 6 Cl. Ct. at 519.

<sup>112</sup> *Lefler*, a contractor inexperienced in government contracts, had submitted a bid based on the use of foreign materials. *Id.* at 516. *Lefler* did not seek an exception because it assumed it could lawfully use foreign steel, the price of which was 24.6% below that of the lowest domestic price. *Id.* *Lefler* was granted a post-award exception through the

Claims Court had explicitly declined to speculate as to the effect of a post-award waiver regarding a bid originally based on the cost of domestic materials.<sup>113</sup> The issue actually decided by the Claims Court was whether the contracting officer was entitled to reduce the contract price because of the waiver.<sup>114</sup> That court found that the Government had made the determination not to deviate from the prescribed differential in granting the waiver, and therefore could not claim that it had lowered Lefler's cost of performance.<sup>115</sup>

Second, the *Grimberg* court defined the post-award exception as one which is granted under the contract's changes clause "only where warranted by the circumstances."<sup>116</sup> The court concluded that *Brady* did not establish a narrow range of circumstances for post-award exceptions, but merely held post-award exceptions to be permissible and allowed "additional factors" to be considered in a request for equitable adjustment.<sup>117</sup> Given that the criteria of the Buy American Act are met, the decision to grant a change, or an equitable adjustment in lieu thereof, is discretionary.<sup>118</sup>

By the use of the term "additional factors," the court clearly intended that the grant of a post-award waiver be a matter of basic fairness. To that extent the court followed *Brady*.<sup>119</sup> Yet, in applying the same differential to a post-award request as to a bid, the court ignored the language in *Brady* recognizing dramatic domestic increases as appropriate preconditions for post-award relief.<sup>120</sup> *Grimberg* made no showing of a change in the domestic market for precast concrete panels. The court's analysis of the fact situation consisted largely of recognizing that granting a waiver would have cost the Government nothing, and may have entitled it to a credit. Instead, the court observed, *Grimberg* was "saddled" with an excess fabrication cost.<sup>121</sup> Thus, the failure to grant the requested waiver was held an abuse of discretion.<sup>122</sup>

The majority left a few important questions unanswered. It gave no guidance as to the weight to be given to the contractor's behavior. It neglected to mention the circumstances under which a contractor

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issuance of a change order because it could not cancel the order it had already placed with the foreign supplier. *Id.* at 517. The contracting officer later issued a unilateral change order reducing the contract price. *Id.*

<sup>113</sup> *Id.* at 519.

<sup>114</sup> *Id.* at 516.

<sup>115</sup> *Id.* at 519.

<sup>116</sup> *Grimberg*, 869 F.2d at 1478.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> See *John T. Brady & Co. v. United States*, 693 F.2d 1380, 1386 (1982) "To hold otherwise, would produce unfair and harsh results without furthering the objectives of the Act."

<sup>120</sup> *Id.* at 1386. See *supra* text accompanying note 94.

<sup>121</sup> *Grimberg*, 869 F.2d at 1478.

<sup>122</sup> *Id.*

might be held to the obligation to furnish the domestic goods upon which the bid was based. Had the Buy American Act not been involved, it is unclear whether Grimberg would have been entitled to any adjustment of his obligation to perform at the bid price.<sup>123</sup> The court did not say why Grimberg should be treated differently from any contractor who bases his original bid on an unreliable or an overly optimistic subcontractor's quote, only to find that the specified materials cannot be had at the quoted price.

Also absent is a discussion of the role of the policy goals behind the Act. Early in the opinion, the court characterized the Buy American Act as requiring the use of domestic products unless the cost is unreasonable or such use is inconsistent with the public interest.<sup>124</sup> The court then stated that the Act is primarily aimed at providing preference in the award process.<sup>125</sup> Later, the court quoted with approval the Veteran's Administration Board in the *Brady* remand to the effect that it is in the public interest to increase "the public's perception of its Government as one which deals fairly with its contractors" when there is no resulting expense to the Government.<sup>126</sup> This seems to indicate that the court considered the Act's obvious policy concerns to be secondary to cost considerations.

The dissent rejected the majority's approach, pointing out that the Buy American Act would not have been enacted if the predominant policy consideration was obtaining the lowest cost to the Government.<sup>127</sup> The Buy American Act requires cost to be balanced against the policy of favoring domestic products in order to protect U.S. labor and industry.<sup>128</sup>

Accordingly, the dissent approached the question of post-award exceptions from the standpoint of contract law. Judge Bennett saw *Brady* as a decision based on fairness, allocating burdens according to fault.<sup>129</sup> He read *Brady* to permit excuse of the contractor from his contractual obligation only when it was impossible for the con-

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<sup>123</sup> The dissent amply demonstrates the weight of authority behind the rule that a contractor assumes the risk of performance, including the risk of unforeseen difficulties in obtaining materials. *Id.* at 1479-80 (Bennett, J., dissenting). See D. ARNAVAS & W. RUBERRY, *supra* note 35, at 7-15 (contractor assumes the risk of performance and, if the risks are obvious, cannot recover even if the work is in fact impossible); *Brady v. United States*, 693 F.2d at 1386 n.3 (citing Comp. Gen. Dec. B-174266 (Feb. 22, 1972) (unconscionable to require performance at contract price because price of specified domestic material had increased "tremendously")).

<sup>124</sup> 869 F.2d at 1476-78.

<sup>125</sup> *Id.* at 1477.

<sup>126</sup> *Id.* at 1478 (quoting John T. Brady & Co., VACAB No. 1300, 84-1 B.C.A. (CCH) ¶ 16,925, at 84,196-97 (1983)).

<sup>127</sup> *Id.* at 1481 (Bennett, J., dissenting).

<sup>128</sup> *Id.* (Bennett, J., dissenting).

<sup>129</sup> *Id.* at 1480 (Bennett, J., dissenting) ("Fairness is an equitable principle and its application in *Brady* took the form of requiring the party causing the additional cost, the government, to bear that cost.").



tractor to make a pre-award request for an exemption.<sup>130</sup> In *Brady* and the cases upon which it relied, either the contracting agency's actions caused the contractor not to seek a pre-award exemption or the material was unavailable after the award.<sup>131</sup> For Judge Bennett, these cases harmonized the contractor's risk of acquiring the specified materials with the government's responsibility for additional costs caused by its own delay.<sup>132</sup>

The two different determinations of the equities in Grimberg's situation underscore the consequences of Judge Bennett's contract centered approach. The majority offered no formula demonstrating the proper use of the differential. It merely compared the bid price, the foreign supplier's quote, and the actual cost incurred by Grimberg, along with the amount by which actual cost exceeded the bid.<sup>133</sup> Judge Bennett maintained that only the expected domestic cost contained in the bid should be compared with the foreign cost, on the grounds that the contractor would have been able to perform at that cost had it done what was reasonably necessary to finalize its subcontract. Use of the prescribed differential in that formula yielded a trivial difference.<sup>134</sup>

The dissent presented one point of interest when addressing the mandatory nature of the prescribed differentials. Judge Bennett contended that the agency head's discretion to apply a higher differential is delegated to the contracting officer.<sup>135</sup> He reasoned that authority conferred by regulation, as opposed to that conferred by statute, may be delegated, and the authority to apply the differentials set by the Executive Order stems not from the Act but from the Order itself.<sup>136</sup> The majority dismissed his contention in a footnote, stating that the contract's definition of "head of agency" explicitly excluded the contracting officer.<sup>137</sup>

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<sup>130</sup> *Id.* at 1479 (Bennett, J., dissenting).

<sup>131</sup> *Id.* (Bennett, J., dissenting).

<sup>132</sup> *Id.* at 1479-80 (Bennett, J., dissenting).

<sup>133</sup> *Id.* at 1478.

<sup>134</sup> *Id.* at 1480 (Bennett, J., dissenting). The dissent calculated foreign cost as \$120,000 (foreign materials portion)  $\times$  1.06 (the 6% differential) + \$117,000 (nonmaterial costs) = \$244,200. The dissent then compared that figure with the \$245,000 quote Grimberg received before the award. *Id.* at 1480 n.2 (Bennett, J., dissenting). The dissent followed *Allis-Chalmers Corp. v. Friedkin*, 481 F. Supp. 1256, 1266-68 (M.D. Pa.), *aff'd*, 635 F.2d 248 (3d Cir. 1980), in applying the differential only to that part of the work which would be performed outside the United States. 869 F.2d at 1480 n.2 (Bennett, J., dissenting). The majority criticized the dissent's use of this technique as being misleading, as it is the technique used for determining the lowest bidder prior to an award. *Id.* at 1478 n.3. The majority simply compared the foreign quote for fabrication (\$120,000) with the actual domestic fabrication cost (\$200,000) to determine whether a waiver should have been granted. Having found that to be the case, it then looked at the overall extra cost incurred by Grimberg. *Id.* at 1478.

<sup>135</sup> *Id.* at 1482 (Bennett, J., dissenting).

<sup>136</sup> *Id.* at 1482-83 (Bennett, J., dissenting).

<sup>137</sup> *Id.* at 1478 n.1.

The dissent's argument here is not persuasive. The Executive Order directs that "the executive agency" determine the reasonableness of domestic prices and prescribes the formula for so doing.<sup>138</sup> In addition, the Executive Order expressly confers the power to use greater differentials on the head of the agency.<sup>139</sup> Moreover, the Comptroller General has described the discretionary authority conferred by the Order consistently as vested in the head of the agency.<sup>140</sup>

Judge Bennett maintained that courts have upheld the contracting officer's exercise of the agency head's discretion in other matters. He relied on one example, the contracting officer's exercise of the power to cancel invitations after the opening of bids when all bids are unreasonable.<sup>141</sup> However, the regulation in effect at the time of the cited decisions expressly delegated that discretion to the contracting officer.<sup>142</sup> The Government itself never attempted to assert this delegation argument. Indeed, the Navy moved to dismiss Grimberg's appeal to the Veteran's Administration Board on the grounds that the contracting officer lacked authority to grant a waiver.<sup>143</sup>

#### IV. Conclusion

*Grimberg* does not necessarily expand the range of circumstances in which a contractor may utilize foreign goods in the performance of a government contract. The head of the procuring agency still has

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<sup>138</sup> Exec. Order No. 10,582, § 2, 3 C.F.R. 230, 231 (1954-1958), *reprinted in* 41 U.S.C. § 10d app. at 1042 (1982).

<sup>139</sup> *Id.* § 5, 3 C.F.R. at 231.

<sup>140</sup> *See, e.g.*, 61 Comp. Gen. 431, 434 (1982) ("vested in the discretion of the Secretary"); 48 Comp. Gen. 403, 405 (1968) ("vested in the agency head"); 39 Comp. Gen. 309, 311 (1959) ("vested in the head of the department or agency concerned"). *See also supra* text accompanying notes 59-61.

<sup>141</sup> *Grimberg*, 869 F.2d at 1483 (quoting 48 C.F.R. § 14.404-1(c) (1988); citing *National Forge Co. v. United States*, 779 F.2d 665 (Fed. Cir. 1985); *Caddell Constr. Co. v. United States*, 7 Cl. Ct. 236 (1985)).

<sup>142</sup> "Invitations may be cancelled before award but after opening when . . . the contracting officer determines . . . (6) All otherwise acceptable bids received are at unreasonable prices." 48 C.F.R. § 14.404-1(c) (1985) (quoted in *Caddell*, 7 Cl. Ct. at 241). *See also National Forge*, 779 F.2d at 667 n.2.

<sup>143</sup> 88-1 B.C.A. (CCH) at 102,891. The Navy contended that the officer's failure to seek a determination from the Secretary of the Navy invalidated his denial of the post-award exception, which in turn invalidated his denial of Grimberg's claim for equitable adjustment. *Id.* The lack of a valid final decision by the officer would deprive the court of jurisdiction. *Id.* The Board denied the Navy's motion because Grimberg's claim was effectively one for equitable adjustment, under the contract's changes clause, for the failure to grant an exception. It held the officer had unquestionable authority to act on the changes clause claim. *Id.* at 102,894. It did not rule on the authority to grant an exception. The dissent made reference to a board finding of fact that the agency validly exercised discretion. *Grimberg*, 869 F.2d at 1438 (Bennett, J., dissenting). This is a misreading; the Board stated, "Apparently the contracting officer had not sought a determination from the Secretary of the Navy, the responsible authority, even though appellant had sent a copy of his request through required channels." 88-1 B.C.A. (CCH) at 102,891.

discretion in the decision to grant waivers or employ higher differentials for price comparisons.<sup>144</sup> *Grimberg* does, however, restrict the freedom of contracting officers, and put a burden on the agency head to make determinations.

The greatest impact from *Grimberg* arises from the manner in which it opens up the post-award period for the contractor. The bid is no longer the binding document it once was. No more does the contractor's bid make him "legally obligated under its contract to furnish the Government a domestic source end product."<sup>145</sup> The contracting officer now has an absolute duty to consider post-award exceptions, if only to forward them upstairs for a perfunctory determination that a greater differential should be applied.

The dissent in *Grimberg* is correct in its fear that the underlying policy of the Buy American Act is threatened by this loosening of the strictures of conventional contract law. However, government contracts are already unusual creatures. The standard changes clause gives the government the unilateral right to change the performance promised by the contractor.<sup>146</sup> This is an enviable right. *Grimberg* is significant because it bestows an as yet undefined right to the contractor at least to have a change considered.<sup>147</sup>

If *Grimberg* does work against the legislative purposes of the Buy American Act, it may not work against the interests of the country. Deciding when to give preference to domestic goods means choosing between the budget deficit and the trade deficit, between the health of individual domestic industries and the competitiveness of the entire economy. Executive Order No. 10,582 was originally promulgated in response to concerns over the deleterious effects of protectionist trade policies.<sup>148</sup> Such executive action may not be possible today, given the popular concern over the country's foreign trade deficit. Perhaps the Federal Circuit unilaterally decided that the benefit to taxpayers from efficiency in government procurements outweighs the Buy American Act's protectionist goals. Unfortunately, the court chose to implement its decision in a manner that seems to weaken the government's contractual powers.

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<sup>144</sup> 41 U.S.C.A. § 10a (West Supp. 1989); Exec. Order No. 10,582, 3 C.F.R. 230 (1954-1958), reprinted in 41 U.S.C. § 10d app. at 1042 (1982); 48 C.F.R. § 25.203 (1988).

<sup>145</sup> 50 Comp. Gen. at 702.

<sup>146</sup> See *supra* note 20.

<sup>147</sup> *Grimberg*, 869 F.2d at 1478. If found to be an abuse of discretion, failure to grant a requested change constitutes a constructive change as defined by the boards of contract appeals. See also *supra* note 35 and accompanying text.

<sup>148</sup> See generally Trainor, *The Buy American Act: Examination, Analysis and Comparison*, 64 MIL. L. REV. 101, 111-14 (1974).